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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 765

HUMBLE OIL & REFINING COMPANY,
Petitioner,

v.

STANDARD OIL COMPANY (KENTUCKY),
Respondent.

PETITIONER'S REPLY BRIEF

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Despite its attempt to suggest that this case is only a local and private commercial dispute, respondent Kentucky cannot escape the true scope and importance of the questions decided by the Court of Appeals and presented to this Court for review. These questions go to the very essence of competition within a major industry in every corner of the nation for the present and for years to come, and involve the meaning and application of one of the most significant antitrust decrees of all time.

There is no need to burden the Court with a detailed response to the major portion of Kentucky's brief. Two points, however, invite comment: (1) Kentucky's effort to make it appear that no antitrust question is presented by

the decision below, and (2) Kentucky's contention that the fundamental antitrust questions cannot be brought to this Court because of alleged inconsistency in the positions Humble has previously taken.

1. This Court's 1911 decree, its meaning and application, and basic antitrust questions run throughout the Court of Appeals' decision, and that Court's view on these questions constituted the basis of its decision.

The Court of Appeals' opinion starts where the Court said it was "necessary" to start—with "the Standard Oil Trust," the territorial "system of marketing" under the Trust, and this Court's 1911 decision (Pet'n A2-A3). The entire predicate of the Court of Appeals' decision was its holding that Kentucky had an "exclusive right" in "its area" to the use of the Standard name and marks deemed cognitive thereof, which was derived from "the method of operation employed by the Trust before 1911," and that Kentucky retained this right after the dissolution of the Trust (Pet'n A3-A4). The Court of Appeals' opinion concluded with a reference to Humble's contention that the Court would be violating the intent of the 1961 antitrust consent decree if it prevented Humble from competing with Kentucky under the ESSO mark, and dismissed that argument as being the same as the argument made and rejected in previous cases as to "the intent of the 1911 dissolution decree" (Pet'n A21).

Thus it is evident that this case presents fundamental antitrust questions of the largest importance. Even Kentucky's statement of the first question it says was presented with respect to its asserted "trademark" rights, suggests on its face the overriding policy questions, including those expressed in the antitrust laws, that would have to be considered and decided in the weighing and determination of its trademark claim.

In fact, Kentucky's statement (Resp. Br. 1-2) that the first question was whether "three contracts" gave Humble the right to use its trademark ESSO in territory in which Kentucky "concededly" had acquired the exclusive right to use the trademark "Standard Oil" is a misstatement of the case and is refuted by the Court of Appeals' opinion.

Far from Kentucky's claimed rights being conceded or Humble's resting its right to the use of ESSO on the contracts, Humble vigorously contested Kentucky's claim to have an exclusive territorial right to use names and marks deemed cognitive of Standard Oil, and pointed to the contracts wherein Kentucky "recognizes" Humble's exclusive right to the use of the ESSO marks in the five-state area. The importance of the contracts in this connection was not that they created this right in Humble but that by their express terms Kentucky acknowledged Humble's right. The Court of Appeals recognized (Pet'n A15), as Kentucky admitted (Pet'n C91), that Kentucky had no right to use ESSO anywhere, but it nevertheless held that Kentucky had the right to bar Humble from using ESSO in the five-state area.

If there had been any such concession of a total trademark monopoly as Kentucky would imply, the Court of Appeals' opinion would not have gone to the length it did to consider and decide the issue of Kentucky's right in the Standard name and marks. As it was, the Court did not get around to discussing the contracts until the latter part of its opinion and then discussed them only as having "a bearing on this litigation" (Pet'n A17) and construed them only in the light of the basic decision the Court reached, irrespective of contract, on the question of the continuing validity of the territorial allocation of the Standard name and marks derived from the outlawed Standard Oil Trust.

2. Even if Kentucky were accurate in its assertions that Humble has maintained during its entire existence the

"doctrine" of territorial allocation that Kentucky espouses and Humble "disavows," there would be no such estoppel as Kentucky attempts to raise against the review sought. *Nancy Ann Storybook Dolls, Inc.* v. *Dollcraft Co.*, 197 F. 2d 293, 295 (9th Cir.), *cert. denied*, 344 U. S. 877 (1952); *Pro-Phy-Lac-Tic Brush Co.* v. *Jordan Marsh Co.*, 165 F. 2d 549, 552-553 (1st Cir. 1948).

Kentucky's argument, however, has no more factual support than legal support.

The fact of long record is that Humble has repeatedly sought to free the market of the territorial allocation of the Standard name and marks that has been decreed in this case. As even the Kentucky brief reveals, Humble took its position against that system of territorial allocation thirty years ago, and it has since endeavored to get a modification of the decree that first sanctioned and supported that system. In that effort Humble stated its position entirely in accordance with its position here. In *Humble Oil & Refining Co.* v. *American Oil Co.*, E. D. Mo. September 29, 1966 (reported at 151 U. S. P. Q. 266 and printed as an Appendix to Kentucky's brief), the Court noted:

> "At the trial of this case witnesses for the plaintiffs [Humble and Jersey] stated that they had no objections to the defendants [Standard of Indiana and its subsidiary] using the name 'Standard' in the east" (151 U. S. P. Q. at 269; Resp. Br. 9a).

That Humble has been obliged in the intervening years to adapt to court rulings it thought were erroneous does not support a charge of inconsistency or disqualify it from making its present effort to establish rules consonant with

the realities of present-day motor travel and principles of free and effective competition.*

At last there is in the decision sought to be reviewed a recognition that, considering "today's interstate motor travel," the Standard Oil reputation is not identified in the public mind by territories with local Standard Oil companies, as was found to be the fact at one time, in *Esso, Inc.* v. *Standard Oil Co.*, 98 F. 2d 1 (8th Cir. 1938), but must be attributed to all Standard Oil companies and shared by all Standard Oil companies. But by holding that the Standard Oil reputation should be "shared" by allocating a territorial monopoly in the use of Standard Oil and all cognitives thereof to the Standard Oil company that first inhabited the area, the decision below has perpetuated restrictions on competition.

The time has thus come for a definitive ruling, which we respectfully submit can only come from this Court, as to whether territorial allocation by court decree of the name and goodwill of Standard Oil, derived from an illegal system of marketing, is allowable, and whether a Standard Oil company should be prevented from competing under its own established and distinctive trademark—accompanied by due identification as to source—in any part of the country, including the "territory" of another Standard Oil company under the Standard Oil Trust, because its trademark may be deemed a "cognitive" of Standard Oil.

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*Kentucky's position is not supported by its reference (Resp. Br. 11-13) to instances in which Humble has resisted the use of the trademark "Standard" by newly formed companies which had no relation whatever to any of the original Standard Oil companies and which were seeking to capitalize on the goodwill associated with the Standard name. These cases all involved manifest deception.

Contrary to the impression given by Kentucky's brief, there have been only two decisions prior to the decision below involving the right to Standard Oil cognitives as between original Standard Oil companies: *Esso, Inc.* v. *Standard Oil Co.* (*of Indiana*), 98 F. 2d 1 (8th Cir. 1938); *Standard Oil Co.* (*Sohio*) v. *Standard Oil Co.* (*of Indiana*), 252 F. 2d 65 (10th Cir. 1958) (discussed at Pet'n 13-14).

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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